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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 823

RUTH COHEN, PERSONALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF BENJAMIN E. COHEN, DECEASED, JEAN COHEN, BETTY COHEN AND CHARLES JAMES COHEN,

Respondents,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

J. ROBERT COHLER,
Counsel for Petitioner.

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vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes New England Mutual Life Insurance Company, a Corporation, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court affirming a decree of the District Court of the United States for the Northern District of Illinois, Eastern Division.

A certified transcript of the Record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith, in compliance with Rule 38 of this Court.

Summary and Short Statement of the Matter Involved.

This action was brought against petitioner for specific performance of an alleged contract for the sale by petitioner to one Benjamin E. Cohen of certain real estate. The District Court entered a decree for specific performance, from which petitioner appealed to the Circuit Court of Appeals. Pending the appeal, the plaintiff, Benjamin E. Cohen, died and respondents were substituted for him. The Circuit Court of Appeals affirmed the decree of the District Court.

This petition is directed to a review of the decision of the Circuit Court of Appeals.

Jurisdiction.

1. This is a suit arising under Section 24(1) of the United States Judicial Code, as amended, between Benjamin E. Cohen, a citizen of the State of Illinois (succeeded by respondents) and petitioner, a corporation organized by a special statute of the State of Massachuetts, and a citizen of the State of Massachusetts, which suit was originally commenced in the State Court and thereafter upon application by petitioner was removed to said District Court.

2. The jurisdiction of this Court is invoked under Section 240 (a) of said Judicial Code, as amended.

3. The date of the decree which petitioner seeks to have reviewed is August 20, 1943 (Tr. 219). The petition for rehearing was denied on February 28, 1944.

Questions Presented.

1. Whether the delivery by petitioner to its own attorneys of the alleged acceptance of the offer of Benjamin E. Cohen constituted a relinquishment by petitioner of possession and control thereof so as to amount to a delivery of such alleged acceptance by petitioner to said Benjamin E. Cohen, and thus to the creation of a binding agreement between the parties.

2. Whether possession of a document by a party's own attorneys is to be considered the same as possession thereof by that party himself.

3. Whether an offeree can be deemed to have accepted a written offer (which acceptance is required by the offer to be in writing and to be delivered) while the document required to constitute the acceptance is still in the possession of the offeree's own attorneys.

Reasons Relied On for Allowance of the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. That the decision of the Circuit Court of Appeals strikes at the very root of the confidential attorney and client relationship because, in effect, it deprives petitioner of the right to the privacy of possession of documents by its own attorneys and to the protection of its rights by its own attorneys.

2. That the decision of the Circuit Court of Appeals is contrary to the fundamental and salutary rule that possession of a document by one's own attorneys is the same as possession thereof by the client itself.

3. That the Circuit Court of Appeals, in effect, by its decision has refused to recognize that delivery by peti-

tioner to its own attorneys of the alleged acceptance could not amount to a relinquishment of possession and control thereof by petitioner.

4. The decision of the Circuit Court of Appeals is in apparent conflict with the decision of another Circuit Court of Appeals, and the Court has decided an important question of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

J. ROBERT COHLER,
Counsel for Petitioner.

IN THE

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OCTOBER TERM, A. D. 1943

No. .....

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Respondents,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was filed January 21, 1944, is reported in 140 Fed. (2nd) 1, and appears in the record at page 250.

The findings of fact and conclusions of law in the District Court appear in the Record at pages 213-218. The decree of the District Court appears in the Record at pages 219-220. The opinion of the District Court appears in the Record at page 212.

Jurisdiction.

(Note Petition, *supra.*)

Statement of the Case.

The facts are not in dispute. Substantially all of the facts material to the consideration by this Court of the questions presented are succinctly set forth in the opinion of the Circuit Court of Appeals, as follows:

> "Following uncompleted prior contractual negotiations between the parties, defendant's Chicago counsel presented to plaintiff an unsigned written contract which plaintiff promptly executed and left with the attorneys to be forwarded to defendant in Boston. On May 26, 1942 defendant returned the agreement fully executed to its Chicago lawyers, who immediately advised plaintiff by telephone of the completed execution and of its intention to deposit the original immediately with the escrow agent and to send a copy to plaintiff.
>
> "The agreement provided that defendant would sell and plaintiff would buy the property subject to certain leases, special assessments, taxes and possible easements, for the sum of $85,000, and that the vendor would furnish a guaranty policy as to the title. Payments were to be made in installments and, in the interim, the instrument was to be held in escrow by Hall & Ellis for the mutual benefit of the parties.
>
> "After telephoning plaintiff, defendant's attorneys prepared three letters: one to plaintiff, saying that the contract had been delivered to the escrow agent; one to the escrow agent, enclosing the document, and a third to plaintiff advising it of these facts. After the letter to plaintiff had been mailed but before the letters to the other parties had left the office, defend-

ant's general counsel in Boston called its Chicago attorneys, saying that defendant had decided that it did not desire to make the transfer unless it could be done in such a way as to prevent prejudice to the tenant and that the matter would be held in abeyance until further notice. Thereupon defendant's counsel advised plaintiff by telephone that they had been in error in writing that the contract had been delivered to Hall & Ellis; that it was being held in the office and would be retained until further notice."

Following the refusal of petitioner's attorneys to deliver the document, which is alleged to constitute the contract in question, or to recognize that any binding acceptance had been made by petitioner of the offer, suit was instituted in the State Court for specific performance. Upon application by petitioner, defendant in said suit, the cause was removed to the District Court on the ground of diversity of citizenship.

Pursuant to stipulation, the cause was submitted to the District Court on depositions and briefs, without the taking of any testimony in open court. The Court entered a decree for specific performance in favor of the plaintiff and against petitioner, from which the appeal was taken.

The Circuit Court of Appeals properly held that everything which preceded the signing of the alleged contract in question was immaterial because it merely constituted uncompleted negotiations in an attempt to secure a final agreement. It was further properly held:

"When plaintiff signed the agreement and left it with defendant's attorneys in Chicago to be forwarded to defendant in Boston for execution, he thereby made a written offer to defendant upon the terms specified therein. 'Where both parties sign a written agreement, the first signer necessarily proposes that the

writing shall represent the bargain between the parties.' 1 Williston on Contracts, Revised Edition 1936, Section 23, p. 46.''

The narrow issue is thus presented as to whether petitioner merely by signing the instrument and returning the same to its own attorneys accepted the offer, notwithstanding the fact that the instrument at all times thereafter remained in the possession of petitioner's own attorneys. The Circuit Court of Appeals held in the affirmative. Petitioner contends that such decision violates fundamental principles relating to the law of contracts and to attorney and client relationship that have been settled from time immemorial.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is issued are that the Circuit Court of Appeals for the Seventh Circuit, erred:

1. In holding that the mere signing by petitioner of the instrument containing the alleged agreement in question, and the returning of the same by petitioner to its own attorneys constituted a binding acceptance of plaintiff's offer and thereby created a binding contract.

2. In failing to hold that possession by petitioner's attorneys of the instrument in question was a private act of petitioner and was the same as petitioner's own possession, and that no acceptance of plaintiff's offer could have become effective without relinquishment by such attorneys of possession of said instrument.

3. In holding that petitioner accepted plaintiff's offer and that a binding contract was created between the parties.

Summary of Argument.

1. Possession by petitioner's own attorneys was the same as possession by petitioner itself.

2. The forwarding by petitioner to its own attorneys of the alleged acceptance was a mere private act of petitioner.

3. A bilateral written contract was contemplated and delivery of that document was essential to the creation of a contract.

4. An acceptance must be made at the place and in the manner required by the terms of the offer.

5. There was no delivery of the alleged acceptance of the offer in the case at bar.

6. The letter from petitioner's attorneys to plaintiff could not constitute an acceptance of the offer.

7. The telephone notification by petitioner's attorneys to plaintiff could not constitute an acceptance of the offer.

ARGUMENT.

The Circuit Court of Appeals properly held that the written offer in this case consisted of the proposed real estate contract which had been signed by plaintiff and submitted to petitioner's Chicago attorneys, Pam, Hurd & Reichmann.

Obviously, however, an acceptance of that offer was required in order that the transaction might ripen into a binding contract. The Circuit Court of Appeals held that petitioner accepted the offer merely by "signing the instrument and returning it to the Chicago attorneys to be placed in escrow." The instrument in question is plaintiff's Exhibit 4 (Tr. 112-15).

We submit that the Circuit Court of Appeals inadvertently has thereby established a precedent for the startling proposition that when a party forwards a document to *his own attorneys*, he does so at the peril of having it become a legally binding act as against third parties. This goes to the very root of the fundamental concept of the existence of a confidential relationship between attorney and client. We believe that this holding of the Court was due to the fact that the question of whether delivery was required to be made to the escrowee, Hall & Ellis, apparently diverted the attention of the Court from the real issue in this case. The two questions (1) whether delivery to Hall & Ellis was essential to a valid acceptance, and (2) whether *relinquishment of possession and control* by Pam, Hurd & Reichmann was required, are entirely separate and distinct. The holding that delivery to Hall & Ellis was not required, is a far cry from the further holding that relinquishment of possession or control by petitioner's attor-

neys of the signed document was not required. We respectfully submit that the Court has held in effect that because delivery to Hall & Ellis was not required, it follows *a fortiori* that it was not necessary for petitioner to relinquish possession or control of the document in question. As is hereinafter pointed out, even if it be conceded that delivery was not limited to Hall & Ellis, nevertheless a private act of the petitioner without relinquishment of possession or control could not constitute an acceptance. The issue is simply whether the very act of a person in signing and forwarding a document to his own attorneys binds him to a third party. *Carried to its logical conclusion the opinion of the Court as it now stands means that a party cannot sign a document and leave it with his own attorney, because possession by his own attorney is no longer to be regarded as the possession and control of the party himself.* The principle has been settled from time immemorial that possession by one's own attorneys is the same as one's own possession, and that when one delivers a document to his own attorneys, it is precisely the same as if he had locked that document in his own desk drawer. Obviously, an attorney may by agreement be appointed as the agent for all parties to receive possession of a document. However, plaintiff has never contended, and there is not a scintilla of evidence in this case to support any theory that petitioner's attorneys were also to act as plaintiff's agents in receiving possession from petitioner of the document in question. Pam, Hurd & Reichmann never purported to act other than as petitioner's own attorneys in the matter. Assuming, as indeed we must under the opinion of the Court, that delivery to Hall & Ellis, was not a condition precedent to the valid delivery of the document, what then was the point of time that the document could have become effective? *That point of time could only have been when the document was out of the possession and control of petitioner*

regardless of whether petitioner surrendered the same to plaintiff or to plaintiff's agent or elsewhere. In the case at bar, that point of time never in fact was reached, *unless* it be assumed that possession by petitioner's attorneys was in some manner different than possession by petitioner itself. Under no other theory could the document be considered as having gone out of the possession or control of petitioner.

We respectfully urge that the opinion of Court of Appeals stands as a precedent for the proposition that one no longer has the right to have the possession of a document by his own attorneys be deemed and considered to be his own possession.

If a bilateral contract is intended by the parties (as in the case at bar) to be *entirely in writing,* delivery of *that document* which the parties contemplate shall constitute the acceptance is essential to creation of a contract.

Moreover, it is fundamental law that delivery of an acceptance must be made at the *place* and in the *manner* required by the terms of the offer.

As is stated in 12 Am. Jur. p. 537, Section 44:

> "Provisions of the offer as to the place, time or manner or method of acceptance must be complied with."

The classic example of the failure of an offeree to make delivery at the *place* specified in the offer is the leading case of *Eliason* v. *Henshaw,* 4 Wheat. (U. S.) 225, 4 L. Ed. 556. In that case an offer requested an answer by return of wagon to Harpers Ferry. The acceptance was sent to Georgetown and received by the offeror at that place. The Court said:

> "Whatever uncertainty there might have been as to the time when the answer would be received, there was

> none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiffs' offer. * * * Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing."

The law in Illinois is to the same effect. *Brach* v. *Matteson,* 298 Ill. 387, 391.

Delivery of an acceptance, of course, may be accomplished in a variety of ways. It may be mailed, telegraphed or delivered in person. The particular manner or method of transmission depends entirely upon the express or implied terms of the offer. We emphasize, however, that delivery of an acceptance necessarily involves two distinct questions (1) *what kind of document is to constitute the acceptance, and* (2) *how is that document to be delivered.*

As was said in *Brach* v. *Matteson,* 298 Ill. 387, 392:

> "If the offer requires an acceptance to be made in writing no other form of acceptance can be made. (Page on Contracts, 2d ed.—sec. 191.)"

Questions relating to the manner or method of communicating an acceptance have been before the courts many times. The most troublesome aspect of that question has arisen in cases in which an acceptance is mailed, and the issue is whether the acceptance becomes effective at the

time of mailing or at the time of actual receipt thereof. In such cases, the courts have held that where from the manner of submission of the offer, such as the mailing of the offer to the offeree, it can be inferred that the offeror contemplated that the offer be accepted by mail, the acceptance becomes effective upon the mailing and not the receipt thereof. On the other hand, where the offer is delivered in person to the offeree, the courts have generally held that the acceptance does not become effective upon the mailing but only upon the actual receipt of the same by the offeree. Thus in such case if the offer is revoked by the offeror prior to his actual receipt of the acceptance, or if the offeree withdraws his acceptance before such receipt, no binding contract comes into existence because there has never been acceptance of the offer. These principles are well set forth in *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation* (C.C.A. 6th) 20 Fed. (2d) 67, 69, where the Court said:

> "The rule is invoked that a contract results when an acceptance is placed in the mails, even though it is lost and not delivered; but we do not think this rule applicable to the present situation.
>
> "The rule applies when the offer is made by mail, or when the parties live some distance apart, and it is fairly inferable that the offer contemplated an acceptance by mail. If the proposal has been delivered personally, the rule, as stated in 6 R. C. L. 614, is as follows: 'In such case the proposer is entitled to personal notice that his offer has been accepted, and in the absence of proof of any agreement on his part that such notice might be sent to him by mail, or that such notice so sent has been actually received by him within the time limited, there has been no notice of such acceptance, and unless the acceptance of the offer has been communiciated to the person making it, it is

of no avail.' See *Weaver* v. *Burr.*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94, 103; Williston on Contracts, §§ 81, 83.

"In this case, the writing asserted to be an offer was delivered personally. Nothing appears to indicate an agreement that the reply thereto might be sent by mail. The contrary is inferable from Mr. Cockburn's statement of his purposes and his later presence in Lexington. The acceptance of the approval had to be communicated to or received by the appellee before it could be held there was a meeting of the minds of the parties."

To the same effect is *Estate Stove Co.* v. *W. E. Kenney, et al.*, 234 Ill. App. 366, 369, where an offer was delivered in person and the Court held that delivery of the acceptance, which had been mailed, could not be effective until the actual receipt thereof by the offeror.

A private act of the petitioner, without relinquishing possession or control of the alleged acceptance, of course, could not constitute delivery thereof.

As is stated in 12 Am. Jur., p. 540, Sec. 46:

"Of course, a letter which is written, but remains in the writer's hands or under his control, is not an acceptance. Similarly, where the offeree promptly delivers a letter of acceptance to his agent with directions to mail it, but the agent neglects to mail it within the time specified in the offer, no contract is formed."

An example of this rule is the case of *Maclay* v. *Harvey*, 90 Ill. 525, where the offeree gave an acceptance to a boy to mail and the boy neglected to mail it until the next day.

Again in 12 Am. Jur., p. 535, Sec. 41, it is stated:

> "A mere private act of the person to whom the offer is made does not constitute acceptance."

To the same effect is *Hollingshead* v. *Morris*, 172 Mich. 126, 134; 137 N. W. 527, where an offeree delivered his acceptance to his agent.

Certainly under the above authorities the signing and mailing of the document to petitioner's own attorneys was merely a private act of the petitioner.

Moreover, even if Pam, Hurd & Reichmann had not been petitioner's own attorneys, delivery to them by petitioner of the instrument in question could not in any event constitute an acceptance, for the reason that the office of that law firm was not the place for the delivery of the acceptance specified in the offer. Either the offer specified delivery to Hall & Ellis, as escrowee, or contemplated delivery to plaintiff. We contended that the offer by its very terms required delivery to Hall & Ellis, as escrowee. *In either event*, however, delivery of the acceptance to Pam, Hurd & Reichmann could be no more effective in the case at bar than was delivery of the acceptance at Harpers Ferry in *Eliason* v. *Henshaw*, 4 Wheat. (U.S.) 225, 4 L. Ed. 556.

If the signing by petitioner of the instrument in question, and mailing thereof to its attorney did not constitute an effective act of acceptance, the entire case is then narrowed down to the simple question as to whether or not the notification by Pam, Hurd & Reichmann to plaintiff constituted such an acceptance. We submit that under the authorities and the elementary principles of the law of contracts above set forth, such notification could not constitute an acceptance of plaintiff's offer because *Exhibit 4 never left the possession of Pam, Hurd & Reichmann.*

The letter written and mailed by Pam, Hurd & Reichmann to plaintiff (Plffs. Ex. 14-A, Tr. 118) obviously could not constitute such an acceptance, because (a) the only form of acceptance provided for under the terms of plaintiff's offer was a delivery of *the document itself* as distinguished from a separate letter; (b) such separate letter, even if it could be construed as an attempted acceptance of the offer, was not delivered in the manner or at the place required by the offer; and (c) in any event, the mailing as distinguished from the receipt of the separate letter could not constitute an acceptance.

With respect to (a) the first of these reasons, Exhibit 4 provides that:

> "The words 'date hereof' mean date of *delivery* of this contract. This contract and the earnest money shall be held in escrow by Hall & Ellis for the mutual benefit of the parties hereto * * *" (Tr. 115).

Certainly "*delivery*" of Exhibit 4 signed by petitioner was necessarily contemplated by plaintiff in making his written offer. Nowhere in plaintiff's written offer (Exhibit 4), is there any reference to a separate letter to be written by petitioner as an acceptance of the offer.

With respect to (b), the second of the above reasons, we point out that even if it should be deemed that a separate letter by petitioner or its attorneys was a proper substitute for the acceptance contemplated by plaintiff's offer, nevertheless the mailing of such separate letter *to plaintiff* was not a delivery thereof in the manner or at the place contemplated by plaintiff's offer, for it was not a delivery of the acceptance to Hall & Ellis, as escrowee. Even if we are wrong in our contention, however, that the place of delivery is so restricted to Hall & Ellis, as escrowee, nevertheless the *mailing* as distinguished from the *receipt* of the

separate letter could not constitute an effective acceptance, for the third reason (c) above noted. Plaintiff's offer was submitted by plaintiff to petitioner's own attorneys in person. Under the above authorities, therefore, receipt, as distinguished from mailing of the letter, would constitute the effective date of the acceptance and petitioner, through its attorneys, admittedly, notified plaintiff before the receipt by plaintiff of the letter, that defendant had refused to accept the offer. Plaintiff in his testimony admitted that in his telephone conversation with Britton on May 28th, Britton stated to him:

> "I am sorry to tell you that I received instructions from the New England Mutual Life Insurance Company not to do anything further in your deal,"

and that Britton further told him

> "that the paper which he had sent—yes, he told me he had sent—that he was going to send to Hall & Ellis by messenger was still in the Messenger Boy's box and that he was able to stop that from going to Hall & Ellis" (Tr. 124).

Certainly it cannot be contended that the previous telephone conversation which plaintiff had with attorneys on that day could constitute an acceptance of plaintiff's offer. Plaintiff's offer clearly contemplated a written acceptance thereof. Nowhere in the pleadings, the record in this case, or the decree itself, is there any suggestion that the contract which plaintiff is seeking to specifically enforce is the result of any verbal acceptance by petitioner of plaintiff's offer. Nowhere in this case is there any suggestion of any estoppel as the basis for the establishment of any contract. Manifestly, if plaintiff's offer contemplated a written acceptance, as is clear in the case at bar, such ac-

eptance could only have become effective under the very rms of the offer by the signing and relinquishment of ossession and control of Exhibit 4 by petitioner. We ubmit that under the undisputed facts, petitioner never ccepted plaintiff's written offer.

In conclusion, we respectfully submit that a writ of cerorari to the Circuit Court of Appeals for the Seventh ircuit should be granted.

J. Robert Cohler,
Counsel for Petitioner.

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OCTOBER TERM, A. D. 1943

No. 876

RUTH COHEN, PERSONALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF BENJAMIN E. COHEN, DECEASED, JEAN COHEN, BETTY COHEN AND CHARLES JAMES COHEN,

Respondents,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

ANSWER AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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ANSWER AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE DECISION BELOW.

The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, is reported at 140 Fed. (2d) 1.

QUESTIONS PRESENTED.

The petitioner in its original brief filed in the Circuit Court of Appeals raised the point that the contract signed by both parties provided that it should be deposited in

escrow with Hall & Ellis (agents of petitioner) to be held by them in escrow for the mutual benefit of both parties; that said contract had never been deposited with said Hall & Ellis; and that, therefore, the failure to so deposit said contract prevented said contract becoming in force between the parties.

The Circuit Court of Appeals in passing on this question said in its opinion (T. 251, 252):

> "By signing the instrument and returning it to the Chicago attorneys to be placed in escrow, defendant accepted plaintiff's proposal and assented to all its terms as expressed in the formal executed agreement. Thereby a binding agreement wherein the minds of the parties had fully met came into existence.
>
> True, the document was not taken to the escrow agent but such delivery was not a condition precedent to the binding effect of the executed agreement. It was merely specification of the means by which the contract was to be performed and was material only as it affected the rights and remedies of the parties arising subsequent to execution. The agreement itself provided that the document should be delivered to the escrow agent after it had been executed. The party who retained the executed contract was under obligation to deliver it to the escrow agent. Failure of the defendant to do so amounted to a breach to that extent for which it became liable to plaintiff."

The Circuit Court of Appeals thus passed upon the question presented to it for decision, and decided it in the language above set forth. Thereupon, the petitioner filed a petition for rehearing and in such petition stated that the decision of the Circuit Court of Appeals, amounted to a determination that the delivery of the signed contract by petitioner to its own attorneys could not be taken as a delivery of the contract to Cohen, because the signed con-

tract still remained in the control of petitioner through its own attorneys. That contention has now been carried by petitioner into the petition for certiorari here presented.

The above statement shows that the questions presented here are not

(a) whether the delivery by petitioner to its own attorneys of the alleged acceptance of the offer of Benjamin E. Cohen constituted a relinquishment by petitioner of possession and control thereof so as to amount to a delivery of such alleged acceptance by petitioner to said Benjamin E. Cohen (quoting from petitioner's brief);

because (1) the executed contract under its terms was to be delivered to Hall & Ellis, as escrowee, and (2) no question of delivery of the executed contract to Benjamin E. Cohen is involved herein because the executed contract under its terms was not to be delivered to Cohen;

(b) whether possession of a document by a party's own attorneys is to be considered the same as possession thereof by that party himself (quoting from petitioner's brief);

because (1) the contract was executed by Benjamin E. Cohen; contained the provision that said contract was to be delivered to Hall & Ellis; and petitioner executed the contract containing said provision and delivered same to his attorneys with instructions to deliver same to Hall & Ellis, and (2) petitioner's attorneys notified said Benjamin E. Cohen that they had received the executed contract from petitioner with instructions to deliver same to Hall & Ellis; and said attorneys stated to said Cohen that they were immediately delivering the executed contract to Hall & Ellis; and they confirmed this in a letter to Cohen which contained a copy of the executed contract;

(c) whether an offeree can be deemed to have accepted a written offer while the written offer is still in the posses-

sion of the offerees' own attorneys (quoting from petitioner's brief);

because (1) the real question is: where an executed agreement is placed in the hands of one of the parties to the contract under an agreement that the party holding same shall deliver the contract in escrow, can the party having possession of the contract by retaining possession of the contract and failing to keep his contractual liability to deliver same in escrow, be heard to claim his own breach of contract in failing to deliver the contract in escrow as a defense to a suit upon the contract.

REPLY TO REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Counsel for petitioner carry into their "Reasons Relied on", the same error that they make in the "Questions Involved Herein", as above set forth.

BRIEF OF RESPONDENTS.

ADDITIONAL STATEMENT OF THE CASE.

Counsel for petitioner in their Statement of the Case have not fully set forth the facts, and we supplement same as follows:

(1) In addition to the portion of the opinion of the Circuit Court of Appeals quoted by counsel we quote from said opinion as follows:

> "By signing the instrument and returning it to the Chicago attorneys to be placed in escrow, defendant accepted plaintiff's proposal and assented to all its terms as expressed in the formal executed agreement. Thereby a binding agreement wherein the minds of the parties had fully met came into existence.
>
> True, the document was not taken to the escrow agent but such delivery was not a condition precedent to the binding effect of the executed agreement. It was merely specification of the means by which the contract was to be performed and was material only as it affected the rights and remedies of the parties arising subsequent to execution. The agreement itself provided that the document should be delivered to the escrow agent after it had been executed. The party who retained the executed contract was under obligation to deliver it to the escrow agent. Failure of defendant to do so amounted to a breach to that extent for which it became liable to plaintiff." (T. 251,252.)

(2) The evidence of the plaintiff (T. 117) shows that on May 28, 1942, the day Britton received the signed con-

tract back from the defendant, Britton called Cohen on the telephone and said that the last document that Cohen had signed was returned to his (Britton's) office, that Cohen then said, "I will come over to your office, Lester, and we will deliver the paper to Hall & Ellis," and Britton then said, "You won't have to do that. I have sent it over by messenger at once." That Cohen then said, "Will you please send me a copy of the document and a verification of that fact?" and that Britton said he would. Then, Britton did mail Cohen a verification of the fact that he had sent the contract to Hall & Ellis and enclosed a copy of the contract.

(3) After the original contract signed by both parties had been received by the attorneys for petitioner, and after the telephone conversation between Cohen and Britton on May 28, 1942, Britton, who was one of the attorneys for petitioner mailed a letter to Cohen dated May 28, 1942, which letter was addressed to said Cohen and was headed "Re: Premises at Wabash and Van Buren Streets." and which contained the following:

> "We send you herewith copy of contract of purchase and sale between you and New England Mutual Life Insurance Company.
>
> We have delivered the executed original contract to Messrs. Hall & Ellis to be held by them in escrow as provided in the contract." (T. 118, 119.)

We, therefore, deny the statement of counsel for petitioner set up on p. 8 of their petition that "the narrow issue is thus presented as to whether petitioner merely by signing the instrument and returning same to its own attorneys accepted the offer, notwithstanding the fact that the instrument at all times thereafter remained in the possession of petitioner's own attorneys."

We further deny that the Circuit Court of Appeals held any such proposition in the form as is presented by counsel for petitioner. In fact the petitioner did not in its original briefs filed in the Circuit Court of Appeals raise the point in the form now presented by it. Counsel for petitioner raised the point here presented for the first time in their petition for rehearing filed in the Circuit Court of Appeals. The point originally raised in the Circuit Court of Appeals by petitioner was that delivery of the contract to Hall & Ellis was a condition precedent to the contract becoming binding between the parties. In raising this point counsel for petitioner urged the claimed fact that the signed contract remained in the possession of its attorneys, as grounds for urging that the contract was never delivered to Hall & Ellis. Counsel for petitioner have thus changed the form but not the substance of their contention before the Circuit Court of Appeals that the contract never became in force as a binding contract because it was never delivered to Hall & Ellis. But the point now raised is really the same point in different words.

SUMMARY OF ARGUMENT.

I. Petitioner does not come within the class of cases referred to in Rule 38 (5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

II. The decision of the Circuit Court of Appeals is in strict accord with all established authorities, local and federal.

III. There is no difference between the questions as to whether delivery of the contract to Hall & Ellis was essential to a valid acceptance, and whether relinquishment of possession and control by petitioner's attorneys was essential to a valid acceptance.

IV. Petitioner agreed with plaintiff in the executed contract and also through its attorneys upon receipt of the executed contract by petitioner's attorneys that the duplicate executed agreement would be delivered to Hall & Ellis. There was a duty on petitioner to deliver the executed contract to Hall & Ellis, and petitioner cannot plead its own default in keeping that agreement.

V. Petitioner is estopped to deny that the executed contract did not leave the possession of its attorneys.

VI. No delivery of the contract to Cohen was contemplated between the parties, and delivery of same to Cohen was not necessary. Petitioner gave notice to Cohen through its attorneys of the acceptance of the contract by petitioner, and the contract became complete between the parties without any delivery to Cohen.

ARGUMENT.

I.

Petitioner does not come within the class of cases referred to in Rule 38 (5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

This case does not come within the class of cases referred to in Rule 38 (5) of this Court. The questions presented here involve contract and local law. Hence, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, as interpreted by this Court in *Ruhlin* v. *New York Life Ins. Co.,* 304 U.S. 202, petitioners are required to show the existence of a real conflict between the decision of the Circuit Court of Appeals and local decisions in Illinois. In *Ruhlin* v. *New York Life Ins. Co., supra,* at page 206, this Court said:

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' "

There is no conflict between the decision of the Circuit Court of Appeals and applicable local decisions on the question that when an executed contract is delivered to one of the parties under an agreement that the contract shall be deposited in escrow by the party holding same, that the failure of the party so receiving and holding the executed contract to deliver the contract in escrow, cannot be pleaded as grounds for claiming that the contract never became effective because of its non-delivery.

It was held in *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, that jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision.

It was held in *U. S.* v. *Johnston*, 268 U.S. 220, that certiorari will not be granted to review evidence and discuss specific facts. In this case the Court would have to consider the facts and determine same before a decision could be rendered on the applicable law.

We submit therefore that this case does not come within the class of cases referred to in Rule 38 (5), and that the petition for a writ should be denied.

II.

The decision of the Circuit Court of Appeals is in strict accord with all established authorities, local and federal.

Cohen signed the contract in duplicate and placed both copies in the hands of petitioner's attorneys. Petitioner's attorneys forwarded this signed contract to Boston, where petitioner executed both copies, retained one copy in Boston and forwarded the other copy to their attorneys in Chicago. Petitioner said in its letter of May 26, 1942, to its attorneys at Chicago: "We acknowledge receipt of your letter of May 22, and return herewith duplicate original of signed contract for the sale of above-mentioned premises and copy thereof for your file. The original we are retaining here." (T. 57.)

Upon receipt of this duplicate original, Britton, who was one of petitioner's attorneys, called Cohen and notified him that the contract had been executed by petitioner and that he was immediately delivering the executed copy he

had received to Hall & Ellis. Cohen said he would like to walk over and deliver same to Hall & Ellis with Britton, and Britton said that would not be necessary because he had already sent the contract over by messenger to Hall & Ellis.

No delivery of the duplicate original of the executed contract forwarded to petitioner's attorneys was thus to be made to Cohen. Cohen was never to receive an executed copy of the contract, but same was to be delivered in escrow to Hall & Ellis. The Circuit Court of Appeals in its opinion held that where Cohen had executed the contract in duplicate and delivered it to petitioner's attorneys, that when petitioner executed the contract in duplicate and forwarded the duplicate contract to its Chicago attorney, to be deposited in escrow, that a duty arose on petitioner to carry out the terms of the contract and deliver it in escrow.

Also, upon receipt of this executed duplicate original petitioner's attorney, Britton, notified Cohen of the execution of the contract and stated he was immediately delivering it to Hall & Ellis, and he confirmed that telephone statement in his letter.

Everything that could be done then had been done, and petitioner could not subsequently retract everything that had been said and done and say that it had not delivered the duplicate original to Hall & Ellis.

In the case of *United States* v. *P. J. Carlin Construction Company,* 224 F. 859, (pp. 862, 863) the Court said:

> "If the Court can see from the writings or correspondence that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from

his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed."

In the case of *Barneby* v. *Barron G. Collier, Inc.*, 65 F. (2d) 864, the Court said (p. 868):

"It is also urged by defendants that the contract sued upon was not accepted by plaintiff before notice of cancellation was received from defendants. The testimony on behalf of defendants tended to show that they had not received an acknowledgment of the contract from the plaintiff. The contract itself contains the recital that 'This contract has been reduced to writing and has been executed first by the Advertiser, and afterwards, in New York, N. Y., by the Advertising Company.' At the bottom of the contract, above the signatures of the parties, appear the words, 'Signed in duplicate,' under which appear the words, 'Accepted in duplicate July 31, 1929, Barron G. Collier, Inc., J. C. Ramsay, Asst. Sec'y.' The contract itself imports its completed execution by the parties thereto. It was, as the instrument itself recites, first executed by the defendants. They signed the contract in Omaha, and it appears from the recitals thereof that at the time they signed it it was in the contemplation of the parties that it should afterwards be signed by the plaintiff in New York. Under these circumstances it was clearly within the contemplation of the parties that the mails should be used as a means of communicating the acceptance of the contract. It appears without dispute that plaintiff accepted the contract in New York, not later than the 3d of August, 1929, before defendants claim to have given any notice of its cancellation. It was accepted in the manner contemplated by the parties, and it appears that the assistant secretary of plaintiff, after indorsing an acceptance

on the contract on the 3d of August, 1929, mailed a copy of same to defendants, retaining one copy in the office of plaintiff."

The law is very plain that if a contract is executed in the manner contemplated by the parties that the contract becomes in force. In the present case it was contemplated by the parties that Cohen would execute two copies of the contract, deliver them to petitioner's attorneys, these attorneys would mail them to petitioner at Boston, that petitioner upon receipt of same would execute both copies, retain one and mail a duplicate original to its attorneys to be deposited in escrow with Hall & Ellis, and that the attorneys would deposit this duplicate original with Hall & Ellis. In no part of this program was Cohen to have delivered to him an executed copy of the contract. Although Britton said to Cohen he had delivered the executed copy to Hall & Ellis and wrote him a letter containing that statement, it was contended on the trial of this cause that Britton was mistaken when he stated he had delivered the contract to Hall & Ellis and when he wrote in his letter to Cohen that he had delivered the contract to Hall & Ellis.

Even assuming that Britton did not deliver the contract to Hall & Ellis the sole question involved was whether the failure to deliver the executed duplicate contract to Hall & Ellis prevented the contract remaining in force when it was plainly the duty of petitioner to deliver the contract to Hall & Ellis.

The *Carlin* case above cited shows that a contracting party cannot evade his responsibility under an agreement by failing to sign a contract when he has agreed so to do. Numerous cases to this effect can be cited.

The *Barneby* case above cited is very much similar to the case at bar and holds that when an agreement is handled

in the manner contemplated by the parties that a valid contract is entered into by the parties.

None of the cases cited by counsel for petitioner are in point under the facts here involved. No delivery to Cohen was to be made of the contract, so the cases cited in petitioner's brief which hold that delivery must be made are not in point.

We submit that the decision of the Circuit Court of Appeals is in strict accord with all established authorities, local and federal.

III.

There is no difference between the question as to whether delivery of the contract to Hall & Ellis was essential to a valid acceptance, and whether relinquishment of possession and control by petitioner's attorneys was essential to a valid acceptance.

Counsel say in italics on p. 11 of their petition that "Carried to its logical conclusion the opinion of the Court as it now stands means that a party cannot sign a document and leave it with his own attorney, because possession by his own attorney is no longer to be regarded as the possession and control of the party himself."

This is a deliberate misstatement of the facts in this case. It is undoubtedly the law that if a party places a paper in the hands of his attorney or agent that it is not delivered until delivery of the paper is made. But in this case you can eliminate the attorneys entirely and the legal situation does not change. Eliminating the attorneys in the transaction, we have a case where Cohen signed the contract in duplicate and delivered the two signed contracts to petitioner. Petitioner was to sign both, retain one and deliver a duplicate original in escrow. No signed copy was to be delivered to Cohen. Petitioner actually

signed both contracts retaining one of the signed copies and caused an agent to notify Cohen that the contract was accepted and that the duplicate original contract had been delivered to Hall & Ellis.

Under these circumstances the only question involved is whether the failure to deliver a signed copy to Hall & Ellis, although the signed contract provided that it should be deposited with Hall & Ellis, prevented the contract from coming into force. On this question the Circuit Court of Appeals, passed, and no question of relinquishment of the signed contract by petitioner's attorneys can enter into a decision of this case. Counsel attempt to be adroit when they talk about relinquishment of possession of the contract, but they are not adroit when they claim that failure to deliver the executed duplicate contract to Cohen prevented the contract from coming into force, because Cohen was never to have delivery of the executed duplicate contract.

No change of front or shuffling of words can alter the fact that when possession of the contract was to be relinquished by petitioner's attorneys that possession was only to be relinquished to Hall & Ellis and never to Cohen. So when counsel refer to relinquishment of possession of the contract they can only refer to relinquishment of possession to Hall & Ellis, and we come back to the same point of whether failure to relinquish possession to Hall & Ellis prevented the contract from being in force.

We, therefore, submit that there is no difference between the question as to whether delivery of the contract to Hall & Ellis was essential to a valid acceptance, and whether relinquishment of possession and control by petitioner's attorneys was essential to a valid acceptance.

IV.

Petitioner agreed with plaintiff in the executed contract and also through its attorneys upon receipt of the executed contract by petitioner's attorneys that the duplicate executed agreement would be delivered to Hall & Ellis. There was a duty on petitioner to deliver the executed contract to Hall & Ellis, and petitioner cannot plead its own default in keeping that agreement.

An examination of the evidence herein shows that the only provision "for the delivery of the contract and the earnest money in escrow" is contained in the formal contract signed by the parties. This provision in the contract is as follows:

> "This contract and the earnest money shall be held in escrow by Hall & Ellis for the mutual benefit of the parties hereto, and after consummation of sale the cancelled contract may be retained by the escrowee." (Plaintiff's Exhibit 4.)

The evidence of the plaintiff (T. 117) shows that the day that Britton received the signed contract back from the defendant, that Britton called Cohen on the telephone and said that the last document that Cohen had signed was returned to his (Britton's) office, that Cohen then said, "I will come over to your office, Lester, and we will deliver the paper to Hall & Ellis," and Britton then said, "You won't have to do that. I have sent it over by messenger at once"; that Cohen then said, "Will you please send me a copy of the document and verification of that fact?" and that Britton said he would.

Under this evidence, plaintiff and the defendant through its attorney Britton made an arrangement or agreement that Britton had or would immediately send the signed contract over to Hall & Ellis. Britton assured plaintiff

that it was not necessary for him to come over to Britton's office and walk with him to the office of Hall & Ellis in order to immediately deposit the signed contract with Hall & Ellis. So plaintiff acquiesced and agreed with Britton that he would not come over to Britton's office but that Britton would assume the responsibility of delivering the signed contract immediately to Hall & Ellis.

Under the above evidence and the provisions of the executed contract the Circuit Court of Appeals correctly held that there was a duty on the defendant to deliver it to the escrow agent. The failure of Britton to keep his agreement with Cohen and the failure of petitioner to deliver the contract as provided in said contract cannot be taken advantage of by petitioner. Clearly the failure of Britton to deliver the contract was a breach of contract, and the claim of petitioner that the contract never left the possession of its attorneys amounts to a claim that defendant's own breach of contract in the failure to deliver the contract can be pleaded in defense of respondents' right. The law does not permit a person to thus take advantage of his own wrong.

We submit that there was a duty on the defendant to deliver the contract to Hall & Ellis as shown by the evidence herein, and a failure of defendant to comply with that duty by retaining possession of the signed contract cannot be pleaded in defense.

V.

Petitioner is estopped to deny that the executed contract did not leave the possession of its attorneys.

It may very well be considered that the defendant is estopped to deny that the signed contract did not leave the possession of Pám, *et al.* As pointed out in the evidence of respondents above quoted, Britton said that Cohen would

not have to come over to Britton's office because "I have sent it over by messenger at once." And again, in the letter from Britton to Cohen after that conversation on the telephone (Plaintiff's Exhibit 14A), Britton said:

> "We have delivered the executed original contract to Messrs. Hall & Ellis to be held by them in escrow as provided in the contract."

So we have two statements by Britton, one verbal and one in writing stating that he had already delivered the signed contract to Hall & Ellis. May we not accept these statements made out of court at a time when no lawsuit was contemplated as the real truth? Do they not effectively contradict the testimony of Britton that he did not actually deliver the contract to Hall & Ellis as previously stated by him? It certainly requires no stretch of the imagination to believe that Britton could have taken the contract back after delivery to Hall & Ellis who were the agents of petitioner.

Ralph M. Strader who was connected with Hall & Ellis, and who supervised the real estate holdings of petitioner (T. 133) testified that Britton informed him a few days after Britton wrote the letter of May 28, 1942, which stated "We enclose herewith ~~executed in duplicate,~~ contract between Benjamin E. Cohen and New England Mutual Life Insurance Company for the sale of the property formerly securing the Sage loan at 405 South Wabash Avenue for $85000. This contract, in accordance with its provisions is to be held in escrow with the earnest money for the benefit of the parties." (Plaintiff's Exhibit No. 11, T. 148, 149); that Britton told him he had written the letter and sent it. (T. 148.)

The above evidence proves that the contract was actually sent to Hall & Ellis under three statements of Britton all made prior to this suit being filed.

We submit that under these circumstances petitioner cannot now contend that the duplicate original contract was not in fact delivered to Hall & Ellis.

VI.

No delivery of the contract to Cohen was contemplated between the parties, and delivery of same to Cohen was not necessary. Petitioner gave notice to Cohen through its attorneys of the acceptance of the contract by petitioner, and the contract became complete without any delivery to Cohen.

The defendant through its attorney, Britton, gave notice of the acceptance of the contract by petitioner, and it was agreed that Britton should send Cohen a letter containing a copy of the signed contract. This agreement made the contract between the parties complete. Delivery of the duplicate executed contract to Cohen was not ever contemplated by the parties and therefore delivery was not necessary. The contract was only to be delivered to Hall & Ellis. If notice of acceptance by petitioner was required, it gave the notice through Britton over the telephone and by the letter sent by Britton to Cohen enclosing a copy of the contract.

The law is well settled that notification of acceptance is sufficient by telephone conversation or in any other manner.

In the case of *Sinaiko* v. *Illinois Smelting & Refining Co.*, 215 Ill. App. 108, the Court said (pp. 111, 112):

> "We see no escape from the conclusion that the contract was made over the telephone. But, even if written confirmation were necessary, the mailing of the letter of December 5 made the contract complete. The mailing of a letter of acceptance constitutes *ipso facto*, acceptance (*Haas* v. *Myers*, 111 Ill. 421; *Chytraus* v.

Smith, 141 Ill. 231), and 'acceptance concludes the contract'; and, subsequently, revocation, *ex parte,* becomes impossible. Anson, Law of Contracts (2nd Am. Ed.) p. 37."

In *Cottingham* v. *National Church Ins. Co.,* 290 Ill. 26, the Court said (p. 32):

> "So a contract is complete when an unqualified assent to the offer of one of the parties is dropped in the post-office properly directed and stamped by the other party, unless the offer is so qualified as to require the actual receipt of the letter of acceptance before the agreement is complete."

In the case of *Wagner* v. *McClay,* 306 Ill. 560, the Court in passing on this point said (p. 563):

> "On the question of the sufficiency of the acceptance of the offer the authorties cited are to the effect that when a letter of acceptance is deposited in the mail, properly addressed and stamped, it will be considered that the acceptance is binding, while the revocation of an option contract only operates from the time it is received by the one to whom it is sent and has no legal effect prior to that time. (1 Elliott on Contracts, secs. 44, 34, and note on p. 53.)"

CONCLUSION.

The decision of the Circuit Court of Appeals is clearly correct. Its decision is in accord with all decided cases on the point involved. Counsel for petitioner have not cited a single case holding to the contrary. Counsel by their petition have attempted to make the Circuit Court of Appeals decision say something that it does not say, and the whole petition is based upon a clearly erroneous claim as to what the Circuit Court of Appeals did decide.

We submit that no question is presented to this Court which justifies the issuance of a writ of certiorari under Rule 38 (5), or any of the other rules governing the granting of such writs. The petition should therefore be denied.

Respectfully submitted,

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